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No. 80-737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITIZENS AGAINST RENT CONTROL/ COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ; EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANTS' BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Does a Berkeley ordinance which limits the amount one can contribute to campaign committees supporting or opposing a ballot measure in an election campaign violate the First Amendment to the United States Constitution?

2. Do ballot measure contribution limits serve any imminently threatened and compelling governmental interest?

3. Can the ordinance's admitted infringement of the rights of speech and association be upheld if appellees failed to meet their burden of establishing the existence of a compelling and imminently threatened governmental interest?

PARTIES TO THIS APPEAL

Appellants Citizens Against Rent Control/Coalition for Fair Housing, an unincorporated association; Mason-McDuffie, a California corporation; Berkeley Board of Realtors, a California nonprofit association; Betty Geritz; Muriel Rosenkranz; and Eva Floystrup were plaintiffs and appellees in the courts below. Appellees City of Berkeley, California, a municipal corporation; the Berkeley City Council; the Berkeley Fair Campaign Practices Commission; Patricia Devito, Betty Bennett, Merlin Edwards, John Chasen, Thomas Donovan, Faith Otis, Sandy Miller, David B. Rosenthal, as members of the Berkeley Fair Campaign Practices Commission, were defendants and appellants in the courts below. There were no other parties.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THIS APPEAL	i
OPINIONS BELOW	2
JURISDICTIONAL BASIS	2
RELEVANT CONSTITUTIONAL PROVISIONS AND SECTIONS OF THE ORDINANCE	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	6
ARGUMENT	8
A. Limitations on Contributions to Ballot Measure Campaigns Are Direct and Substantial Restraints upon the Exercise of First Amendment Rights of Political Speech and Association	8
1. In Contrast to Candidate Contribution Limits, Ballot Measure Contribution Limits Directly Curtail Free and Open Debate of Issues of Public Importance	11
B. Since Section 602 Restrains the Exercise of Fundamental Rights, It Is Subject to the Strictest Judicial Scrutiny and Can Be Sustained Only if Berkeley Convincingly Demonstrates That Contribution Limits Advance a Legitimate and Imminently Threatened Governmental Interest by the Least Burdensome Means Available	14
C. Limits on Contributions to Ballot Measure Campaigns Do Not Further Any Imminently Threatened and Compelling Governmental Interest	16
1. Preventing the Corruption of Candidates for Public Office Is Not a Compelling Interest in a Ballot Measure Campaign	16
2. Limiting Contributions to Equalize Political Communication Is Not a Compelling or Legitimate Governmental Interest in a Ballot Measure Campaign	17
3. Large Contributions to Ballot Measure Campaigns Do Not Imminently Threaten Citizens' Confidence in Government or the Integrity of the Electoral Process	18
CONCLUSION	34

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PAGE

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U.S. CONST. amend. I 2, 3, 7, 8, 9, 10 11, 12, 14, 15, 24, 26, 30, 33, 34

CAL. CONST.
Art. II § 8(a-b) 9
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28 U.S.C. § 1257(2) (1976) 3
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Section 84211 28
Berkeley, Cal., Berkeley Election Reform Act of 1974, Ordinance 4700-N.S. (June 4, 1974)
Section 112 28
Section 217 4
Section 219 ..... 3, 7
Section 412(g) 28
Section 602 ..... 2, 3, 4, 5, 6, 7, 8, 14 15, 16, 18, 19, 24, 30, 31, 32, 33, 34, 35
Section 604 ..... 4, 5
Section 700 4
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OPINION BELOW

The opinion of the California Supreme Court is cited as *Citizens Against Rent Control* v. *City of Berkeley*, 27 Cal.3d 819, 614 P.2d 742, 167 Cal.Rptr. 84 (1980). The opinion appears at page A-1 of the Appendix to Jurisdictional Statement (J.S. App.) filed herein on November 6, 1980.

The opinion of the California Court of Appeal was cited (until vacated) as *Citizens Against Rent Control* v. *City of Berkeley*, 99 Cal.App.3d 736, 160 Cal.Rptr. 448 (1979). The opinion appears in the J.S. App. at A-32.

JURISDICTIONAL BASIS

(i) On April 6, 1977, appellants filed suit for declaratory and injunctive relief in the Superior Court of California in and for the County of Alameda. The complaint challenged the validity, under the first amendment to the Federal Constitution, of section 602 of the Berkeley Election Reform Act of 1974, Berkeley, Cal. Ordinance 4700-N.S. (June 4, 1974) (the Ordinance),[1] which prohibited a donor from contributing more than $250 to campaign committees supporting or opposing a measure on the Berkeley municipal ballot. The superior court immediately issued a temporary restraining order and six days later a preliminary injunction against enforcement of section 602.[2] In August of 1977 on final hearing, the superior court granted summary judgment for appellants holding section 602 unconstitutional.[3] The California Court of Appeal, First Appellate District, Division Two, unanimously affirmed the trial court. The California Supreme Court in a 4 to 3 decision, reversed the courts below and sustained the validity of section 602 against appellants' constitutional attack.

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[1] Unless otherwise indicated, all references to "sections" are to sections of the Ordinance; the Ordinance appears in the J.S. App. at A-53.

[2] The Temporary Restraining Order and Order Sustaining Application for Preliminary Injunction appear at pages 50 and 52, respectively, of the Joint Appendix (Jt. App.).

[3] The Order Granting Summary Judgment, the Judgment, and the Notice of Entry of Judgment appear in the J.S. App. at A-48, 50 and 52, respectively.

(ii) The judgment of the California Supreme Court was rendered on August 7, 1980. Appellants filed their notice of appeal in the California Supreme Court on October 28, 1980.[4]

(iii) This Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2) (1976), which provides for an appeal from a final judgment of a state's highest court "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, . . . and the decision is in favor of its validity." Section 1257(2) applies where a municipal ordinance has been declared constitutional by a state's highest court. *Erzoznik* v. *City of Jacksonville*, 442 U.S. 205, 207 n.3 (1975); *King Mfg. Co.* v. *City Council of Augusta*, 277 U.S. 100 (1928); *see Coates* v. *City of Cincinnati*, 402 U.S. 611, 612 (1971).

RELEVANT CONSTITUTIONAL PROVISIONS AND SECTIONS OF THE ORDINANCE

The relevant constitutional provision is the First Amendment to the United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Relevant portions of the Berkeley Ordinance are:

> Section 602: No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250).
>
> Section 219: "Persons" means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company corporation, association, committee, and any other organization or group of persons acting in concert.

[4] A copy of the Notice of Appeal appears in the J.S. App. at A-100.

Section 217: "Measure" means any City Charter amendment, ordinance or other proposition submitted to a popular vote at an election, whether by initiative, referendum or recall procedure or otherwise, or circulated for the purposes of submission to a popular vote at any election, whether or not the proposition qualifies for the ballot.

Section 604: If any person is found guilty of violating the terms of this chapter, each campaign treasurer who received part or all of the contribution or contributions which constitute the violation shall pay promptly, from available campaign funds, if any, the amount received from such persons in excess of the amount permitted by this chapter to the City Auditor for deposit in the General fund of the City.

Section 700: Any person who knowingly or willfully violates any provision of this ordinance is guilty of a misdemeanor punishable by a fine for each violation of three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received.

STATEMENT OF THE CASE

At each stage of the proceedings below, appellants contended that section 602 impermissibly violated appellants' fundamental rights of speech and association, did not further any compelling governmental interest, and that no such interest was (or could be) demonstrated by appellees (hereinafter sometimes referred to as "Berkeley") in the context of ballot measure campaigns.

At the April 19, 1977 Berkeley municipal election, Berkeley voters were asked to vote on Measure B which, if adopted, would have imposed a complex system of rent controls upon thousands of rental units in Berkeley.[5] Measure B was controversial and groups of citizens formed to campaign

[5] The text of Measure B, consisting of approximately 5400 words, is reproduced in the Clerk's Transcript on Appeal (C.T.) at 113-16.

for and against its passage. Approximately 1,300 citizens formed an unincorporated association (a campaign committee) organized in accordance with the Ordinance and California election law, to oppose the passage of Measure B; they called themselves Citizens Against Rent Control (CARC) which is an appellant herein.[6] CARC solicited and accepted campaign contributions, hired an experienced campaign consultant, engaged in extensive research on the effects of rent control, published campaign literature and generally conducted an active campaign against Measure B.[7] Supporters of Measure B likewise conducted an active, far-reaching and intensive campaign.[8]

Prior to the election, a controversy arose concerning Berkeley's intent to enforce the $250 contribution limit contained in section 602. Appellants believed that the City had publicly declared that it was *not* going to enforce section 602 and in reliance thereon, CARC solicited and received $18,600 in contributions above the $250 limit; it is also undisputed that appellants Mason-McDuffie, a Berkeley real estate firm, and the Berkeley Board of Realtors (composed of 450 members) made contributions to CARC of $1,000 and $5,000, respectively.[9] Twenty days before the election, appellee, The Berkeley Fair Campaign Practices Commission, ordered CARC immediately to surrender the $18,600 to the City treasury, pursuant to section 604 of the Ordinance.[10] Appellants, faced with the loss of badly needed funds at the most crucial juncture of an important election campaign, filed suit and obtained injunctions against enforcement of sections 602 and 604 and utilized the $18,600 during the last days of their campaign. Measure B was rejected by the voters on election day. Since CARC incurred an $8,000 campaign debt, appellants amended their complaint below to seek the right to collect amounts greater than $250 to retire the debt after the election.[11]

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[6] Jt. App. at 2, 32.
[7] Jt. App. at 31-35.
[8] Jt. App. at 5, 6, 34.
[9] Jt. App. at 23-24, 26, 30, 33.
[10] *See* Declaration of Edythe Campbell, J.S. App. at A-88.
[11] Jt. App. at 54-56.

Appellants shared a common belief that Measure B should be defeated. They believed that Measure B would severely diminish the value of Berkeley real property (including their own), interfere with the conduct of their businesses and create serious social and economic problems in the City, including elimination and/or deterioration of rental units, reduction of available housing and diminution of the City's tax base. They believed that the most effective way to communicate their beliefs to the Berkeley electorate was to join together and pool their resources through contributions to CARC, which would conduct and coordinate an organized research and campaign effort.[12]

Appellants submitted uncontroverted evidence below that the $18,600 was necessary to conduct an effective campaign against Measure B in the weeks before election day; that other persons and entities desired to contribute more than $250 to CARC but were reluctant to do so because of the uncertainty caused by section 602; that to communicate effectively the ill effects of the proposed rent control law embodied in Measure B, expensive research and voter contact had to be conducted (for example, appellants produced uncontroverted evidence that the cost of a mailing to each of the 71,088 registered voters in Berkeley was approximately $12,800); and that experienced campaign personnel had to be hired.[13]

The only evidence offered by appellees at any stage of the proceedings below was the Declaration of Edythe Campbell, Berkeley City Clerk.[14] This declaration merely stated that appellee, The Berkeley Fair Campaign Practices Commission, had demanded that CARC surrender the $18,600. It contained no proof or offer of proof of any compelling governmental interest to justify section 602.

SUMMARY OF ARGUMENT

This case presents the question of whether limits on the amount a person or entity can contribute to ballot measure

[12] Jt. App. at 5-6, 25-35.
[13] Jt. App. at 6-7, 9, 11-13, 32-35.
[14] J.S. App. at A-84-88.

campaigns are constitutional. The applicable method of analysis and, ultimately, the answer to the question are enunciated in prior decisions of this Court which were ignored by the state court below.

The challenged Berkeley Ordinance limits to $250 the total amount of money a "person"[15] can contribute to all committees supporting or opposing a ballot measure in a municipal election and subjects violators to misdemeanor prosecution.

The making of a campaign contribution constitutes an exercise of the rights of speech and association protected by the first amendment. Section 602 imposes substantial restraints on the exercise of those rights in two ways. First, it restricts the quantity and effectiveness of speech and association of persons who desire to campaign together to express their opinions in support of or in opposition to a ballot measure. Second, it limits political debate and the flow of information and ideas to the voting public, thus imposing a form of quantitative censorship which prevents the citizenry from receiving and evaluating all available information about an issue of public importance.

Since section 602 infringes on the exercise of fundamental first amendment rights, it is subject to the closest judicial scrutiny. Section 602 may be sustained only if appellees can meet their burden to demonstrate that a) there is a legitimate purpose and compelling governmental interest served by the contribution limit; b) the interest is imminently threatened; c) there is a nexus between the contribution limit and protecting the interest; and d) the contribution limit is the least restrictive means of protecting the interest.

Prior decisions of this Court, as well as opinions of the Second and Ninth Circuits and the Michigan Supreme Court show that ballot measure contribution limits further no compelling governmental interests and cannot survive close scrutiny. Moreover, the decision under appeal directly conflicts with a contemporaneous decision of the Court of Appeals for the Fifth Circuit which invalidated virtually identical ballot measure contribution limits in the State of Florida.

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[15] Section 219 defines "person" to include individuals, partnerships, syndicates, business trusts, company corporations, associations and any other group of persons acting in concert. J.S. App. at A-63.

The state court opinion is a substantial and unwarranted departure from fundamental first amendment principles. At its core is the theory that too much information in a public debate on a political issue is pernicious because it may persuade the voters to vote in a certain way. The state court theorized (in the absence of any record evidence) that such alleged "domination" of public opinion leaves some citizens with stilled voices and potentially perverts the election process. These very justifications have been expressly rejected by this Court and others as not being legitimate or sufficiently compelling to warrant governmental restrictions on the rights of citizens to speak and associate in a ballot measure campaign or to receive all information available concerning the issues under debate.

Appellants respectfully submit that the decision of the California Supreme Court should be reversed and section 602 should be declared unconstitutional.

ARGUMENT

A. Limitations on Contributions to Ballot Measure Campaigns Are Direct and Substantial Restraints upon the Exercise of First Amendment Rights of Political Speech and Association.

First amendment protection extends to political activity including public debate concerning candidates for elective office, issues of public importance, and all matters relating to the political processes. *See Mills* v. *Alabama*, 384 U.S. 214, 218-19 (1965). Discussion of public issues is integral to our system of government and "the First Amendment affords the broadest protection to such political expression. . . ." *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964).

In reaction to the 1972 election campaign and ensuing national concern over Watergate, many jurisdictions attempted to regulate the amount of money spent in election campaigns.

Although enacted primarily to remedy abuses caused when large contributors gain influence over candidates for public office, such legislation in some instances has regulated "issue" campaigns, commonly referred to as ballot measures, direct legislation, popular legislation, initiatives and referenda[16] (hereinafter collectively referred to as "ballot measures").

Public debate on ballot measures embodies the discussion of important issues in one of its most democratic forms. There are two principal ways in which the citizenry exercises first amendment rights by the spending of money in ballot measure campaigns. The interested citizen may pool his or her money or assets with others by making a "contribution" to an organized campaign committee (such as CARC), or the person may make an "expenditure" of money independent of other persons and campaign committees for such purposes as informational mailings, campaign posters and newspaper or media advertising.

A citizen's contribution of money to an election campaign committee is a form of protected political speech. *See Buckley* v. *Valeo,* 424 U.S. at 14. First amendment protections also apply to the rights of campaign committees to receive and expend funds as money is necessary to pay for research and political communications that are vital to conduct contemporary campaigns.

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

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[16] The initiative is the power of the people to propose laws and/or constitutional amendments independent of the legislature. An initiative is generally proposed by presenting to the designated state official a petition which sets forth the text of the proposed law or amendment and is signed by the required number of voters. *See* BLACK'S LAW DICTIONARY 923 (4th ed. 1951); CAL. CONST. art. II, § 8(a-b).

The referendum is the power of the people to approve or reject statutes that would otherwise become law. A referendum is also proposed by a petition presented to a designated state official and signed by the requisite number of voters. *See* BLACK'S LAW DICTIONARY 1446 (4th ed. 1951); CAL. CONST. art. II, § 9(a-b).

> This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. . . . The electorate's increasing dependence on television, radio and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Buckley v. *Valeo*, 424 U.S. at 19 (footnote omitted). "It is too late to suggest 'that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.' " *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 n.23 (1978) (citations omitted).

Limits on contributions to campaign committees such as CARC infringe on citizens' right to associate as well as to speak. The first amendment protects the right of citizens to associate freely to advocate as a group, political and governmental beliefs and to assert legal and economic interests. *See Healy* v. *James*, 408 U.S. 169 (1972); *NAACP* v. *Button*, 371 U.S. 415 (1963). "[F]reedom to associate with others for the common advancement of political beliefs and ideas is . . . protected by the First and Fourteenth Amendments." *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57 (1973).

Freedom of association, recognized as a separate and distinct constitutional right in *NAACP* v. *Alabama*, 357 U.S. 449 (1958), has become increasingly important in modern times when, in order to have an effective voice, individuals or groups find it necessary to join with others to express mutual concerns and to pursue common goals. As stated in *NAACP* v. *Alabama*, 357 U.S. at 460, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . ."

In *Buckley* this Court affirmed that the making of contributions to an election campaign committee is an exercise of the right of association. *Buckley* v. *Valeo*, 424 U.S. at 24-25. "The

right to make political contributions is protected under the first amendment as an important freedom of association." *Let's Help Florida* v. *McCrary,* 621 F.2d 195, 199 (5th Cir. 1980), *appeal docketed,* No. 80-970 (Dec. 8, 1980). Thus limits on contributions to campaign committees necessarily restrict the association and pooling of resources of the committees' supporters and members.

1. In Contrast to Candidate Contribution Limits, Ballot Measure Contribution Limits Directly Curtail Free and Open Debate of Issues of Public Importance.

Limitations on a citizen's right to make campaign contributions "operate in an area of the most fundamental First Amendment activities," *Buckley* v. *Valeo,* 424 U.S. at 14, particularly in ballot measure elections, where citizens participate directly in the enactment or rejection of legislation by voting on a particular issue at the polling place. Every state except Delaware (not to mention thousands of local governments) provides for such popular decision-making.[17]

Appellees and the state court below failed to apprehend the fundamental and constitutionally significant differences in the nature, purpose, conduct and effect of ballot measure and candidate campaigns. The most significant difference is obvious: the election of a candidate versus the enactment of legislation. Issue elections involve direct participatory democracy by the citizenry, whereas candidate elections involve representative democracy in which the officeholder legislates as the citizen's elected representative.

Unlike the election of a candidate, who usually cannot place all of his or her programs into effect immediately (or sometimes at all), the results of an issue election are immediate. If a ballot measure is approved, it usually results in the enactment of a law with simultaneous impact on the citizenry. Often ballot measures propose legislation which has a direct

[17] A. Ranney, *The United States of America,* in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 69-73 (D. Butler and A. Ranney eds. 1978) (hereinafter Ranney, *The United States of America*). *See generally* T. DURBIN, INITIATIVE, REFERENDUM AND RECALL: A RESUME OF STATE PROVISIONS, REP. NO. 81-63A, 751/110 CONGRESSIONAL RESEARCH SERVICE (1981); T. DURBIN, INITIATIVE, REFERENDUM AND RECALL: A RESUME OF STATE PROVISIONS, REP. NO. 76-95A, 597/110 (updated by R. A. Reimer 1976) and R. A. REIMER, ADDENDUM I (1977) CONGRESSIONAL RESEARCH SERVICE.

and immediate financial, social or cultural impact on certain segments of the community. As previously mentioned, Measure B submitted to the Berkeley electorate in this case, if adopted, would have enacted a severe system of rent controls in Berkeley which appellants believed would significantly reduce property and business values, eliminate housing stock and cause negative social and economic effects in the city. When the outcome of public debate on issues will have such direct effects, it is crucial to protect the free exercise of first amendment rights.

The role of contributors differs significantly with respect to candidate and ballot measure elections. Candidates speak out on many issues that affect our lives and environment, but rarely share common views and opinions on all important issues with those who support their campaigns with monetary contributions (or votes). If given the opportunity, a candidate and his or her supporters would not speak with one voice on every issue. Candidates are free to use the entire contribution to further their candidacy in any way they deem best, even if it includes communicating views on subjects about which they and their contributors disagree.

Citizens usually support a candidate out of a general respect for the person's integrity, honesty, intelligence and philosophy, or even out of a dislike or mistrust of his or her opponent. A contributor to a candidate's campaign expresses general support for the candidate but has no control over the focus or content of the candidate's political speech which the contribution enhances. Thus, this Court correctly observed in *Buckley* that contributions to a candidate's campaign serve as a "general expression of support" for the candidate and that since the amount contributed is only a "rough index of the intensity of the contributor's support," candidate contribution limits are only a "marginal restriction" upon the contributor's political communication. 424 U.S. at 20-21.

Appellees and the state court below mistakenly embrace the above-quoted language in contending that limits on contributions to ballot measure campaigns are likewise only "marginal restrictions" on speech. In contrast to candidate campaigns,

a contribution to a ballot measure campaign committee directly promotes and enhances the view of the contributor for or against the issue under debate. Issue elections provide the voters with only two choices: yes or no. While contributors to a ballot measure campaign committee do not necessarily control the specific manner in which their money will be spent, they know that it will be used to communicate their beliefs on a single issue. This distinction was summarized by the California Court of Appeal below:

> A candidate is likely to have opinions on more than one subject; thus any contribution to him will be "undifferentiated" to the extent that it cannot be allocated for the candidate's use contingent upon his espousal of a particular point of view on a particular issue. Obviously, the situation is entirely different when a contribution is made to an entity dedicated to a single issue. To the extent that a contribution is made to such an issue-oriented body, the situation is not likely to fall within the purview of the *Buckley* court's statement that "the transformation of contributions into political debate involves speech by someone other than the contributor." . . . There is a tighter nexus between a contributor and a one-issue organization, and a greater likelihood that the contribution will be used as the contributor wishes than is the case with the attenuated relationship between a contributor and a political candidate who is obliged to take a position on more than one issue.

Citizens Against Rent Control v. *City of Berkeley*, 99 Cal.App.3d 736, 744-45, 160 Cal.Rptr. 448, 453 (1979); J.S. App. at A-42 (citation omitted). Contributions in ballot measure campaigns are not merely "undifferentiated symbolic acts," but directly and substantially express the contributor's opinion with respect to a single issue of public importance.

Campaign contribution limits restrict associational rights and thereby diminish the effectiveness of political speech. CARC is an unincorporated association of appellants and others who desired to campaign together in opposition to Measure B. In order to conduct such an effort with its

inevitable expense, many persons contributed money to CARC which became the voice that expressed the belief of its members that Measure B should be rejected. Such association is particularly important in a ballot measure election where there is no candidate to speak and focus public attention on campaign issues, and often the only effective advocate that can be heard is a campaign committee. Contribution limits obviously affect the ability and right of contributors to associate, to act and to communicate their beliefs effectively. *See Buckley* v. *Valeo*, 424 U.S. at 22.

An equally important corollary to the right of citizens to speak and associate is that all citizens are entitled to hear the speech of others, particularly when the speech communicates thoughts and ideas on issues of public importance. For better or worse, it takes money to speak in our contemporary society, and any limit on the amount of money one may contribute to a ballot measure campaign committee necessarily limits the quantity of public debate and diminishes the flow of information to the citizenry. Limits on contributions to ballot measure committees impose direct and substantial restraints upon the exercise of the fundamental first amendment freedoms of speech and association.

B. Since Section 602 Restrains the Exercise of Fundamental Rights, It Is Subject to the Strictest Judicial Scrutiny and Can Be Sustained Only if Berkeley Convincingly Demonstrates That Contribution Limits Advance a Legitimate and Imminently Threatened Governmental Interest by the Least Burdensome Means Available.

A strict test must be applied when first amendment rights are affected. Where, as here, an ordinance infringes upon the exercise of the fundamental rights of speech and association, it "is subject to the closest scrutiny." *Buckley* v. *Valeo*, 424 U.S. at 25 (quoting *NAACP* v. *Alabama*, 357 U.S. at 460-61); *Consolidated Edison Company* v. *Public Service Commission*, ___U.S.___, 100 S.Ct. 2326 (1980); *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 786; *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Shelton* v. *Tucker*, 364 U.S. 479 (1960). Section 602 can be sustained only upon a convincing demonstration that it furthers a compelling governmental interest and "the burden is

on the government to show the existence of such an interest." *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976); *NAACP* v. *Button*, 371 U.S. at 438-39. A mere showing of the existence of a legitimate and paramount governmental interest is insufficient. Berkeley must also demonstrate that the interest is imminently threatened and that the suppression of speech and association is necessary to and does protect such interest from the threat. *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). "Even then, the State must employ means 'closely drawn to avoid unnecessary abridgment. . . .' " of first amendment rights. *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 786 (quoting *Buckley* v. *Valeo*, 424 U.S. at 25).

The relevant considerations in determining whether section 602 can survive strict scrutiny, can be paraphrased as follows: (1) Does section 602 seek to achieve a legitimate governmental interest? (2) Is the interest compelling? (3) Is the interest imminently threatened by the exercise of speech and/or association? (4) Is there a nexus between the contribution limit and the interest; in other words, does section 602 actually serve, other than randomly, an imminently threatened, compelling interest? (5) Does section 602 employ means which infringe as little as necessary upon freedom of expression and association? Berkeley must demonstrate convincingly that section 602 satisfies all of these tests.

Although purporting to subject section 602 to strict scrutiny, the state court fundamentally altered the standard of review set forth in *Buckley* and *Bellotti*. In reality, it engaged in a balancing test, weighing Berkeley's interest in protecting the initiative process against what it postulated as section 602's "marginal" encroachment on appellants' first amendment rights. Even if the state court was correct that section 602 was a marginal restriction on first amendment rights, it was still required to apply strict scrutiny instead of the balancing test which eliminated Berkeley's burden to demonstrate a compelling governmental interest and an imminent threat to such interest.

C. Limits on Contributions to Ballot Measure Campaigns Do Not Further Any Imminently Threatened and Compelling Governmental Interest.

Berkeley failed to demonstrate the existence of an imminently threatened, compelling governmental interest which is served by section 602; nor is such a demonstration possible in the context of a ballot measure campaign. Although only the gravest abuses endangering paramount interests of government can justify curtailment of first amendment rights, appellees failed to offer any evidence below of an interest which even arguably compels upholding the contribution limit. Nevertheless, the state court ignored the only evidence before it and upheld section 602.

1. Preventing the Corruption of Candidates for Public Office Is Not a Compelling Interest in a Ballot Measure Campaign.

The governmental interest in preventing the appearance or reality of corruption of candidates for public office has no application to a ballot measure election. *Buckley* held only that the prevention of corruption and of the appearance of corruption of candidates and officeholders created by the real or perceived influence of large contributors was the compelling governmental interest which justified candidate contribution limits.

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential officeholders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.
>
> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.

Buckley v. *Valeo*, 424 U.S. at 26-27 (footnote omitted).

Appellees and the state court contended that the *Buckley* rationale regarding corruption applied to allow limits on contributions to ballot measure campaigns. However, this contention ignores the fundamental differences between candidate and ballot measure campaigns and the narrow and well-defined reasoning of *Buckley*, which focused on the improper influence that large contributions have or appear to have on public officeholders to undermine the proper functioning of representative democracy. Since there are no candidates in ballot measure campaigns, which embody direct rather than representative democracy, the *Buckley* rationale is irrelevant in the context of a ballot measure campaign. *Schwartz* v. *Romnes*, 495 F.2d 844, 852-53 (2d Cir. 1974); *C & C Plywood Corp.* v. *Hanson*, 583 F.2d 421, 425 (9th Cir. 1978); *Let's Help Florida* v. *McCrary*, 621 F.2d at 199-200.

2. Limiting Contributions to Equalize Political Communication Is Not a Compelling or Legitimate Governmental Interest in a Ballot Measure Campaign.

The majority opinion below is largely grounded in the theory that contributions of large amounts of money in a ballot measure campaign may be limited in order to equalize political communication and thus presumably to enhance the relative voice of the less wealthy. The state court postulated that "the domination of these [electoral] processes by large contributors leaves other citizens with a stilled voice. . . ." 27 Cal.3d at 826-27, 614 P.2d at 746, 167 Cal.Rptr. at 88; J.S. App. at A-9-10. This concept has been rejected by this Court as a compelling or legitimate interest and is no justification for ballot measure contribution limits.

In striking down expenditure limits, *Buckley* specifically rejected the argument that government may limit political communications of the wealthy so as to augment the ability of others to influence the outcome of elections.

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest

> possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *New York Times Co.* v. *Sullivan, supra,* at 266, 269, quoting *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945), and *Roth* v. *United States,* 354 U.S., at 484.

Buckley v. *Valeo,* 424 U.S. at 48-49.

Buckley and *Bellotti* hold that the fundamental rights of speech and association of some may not be restricted in order to enhance the relative voice of others. The state court attempted to distinguish *Bellotti* on the ground that section 602 is less restrictive than the Massachusetts law that prohibited corporate contributions and expenditures in ballot measure campaigns. This factual difference, however, is constitutionally meaningless in terms of the strict scrutiny standard. It is irrelevant whether a law's infringement of first amendment rights is total or partial if there is no compelling governmental interest to justify the infringement. *Bellotti* nowhere even suggests that its result is based on the law's total prohibition of contributions. Such contributions simply posed no demonstrated or demonstrable danger to the election process and hence no compelling governmental interest was or could be established. The same is true here.

3. Large Contributions to Ballot Measure Campaigns Do Not Imminently Threaten Citizens' Confidence in Government or the Integrity of the Electoral Process.

The state court held that large contributions threaten and potentially pervert or corrupt the electoral process, which allegedly results when citizens' confidence in government is destroyed because they come to believe that only money makes a difference in determining the outcome of ballot measure elections. When distilled, the principal components of the decision are that: a) the side that spends the most money prevails; b) the public is misled by the political communications of selfish special interest groups and votes as instructed by such groups; and c) voter apathy in ballot measure campaigns inevitably results.

The state court sought to bolster these unfounded theories by reference to a commentator on the political scene, a political scientist's opinion published twenty years ago, and a study of a Colorado ballot measure. Such flimsy data was the only basis upon which the majority below upheld section 602. While some may find these theories and the authorities relied on by the court interesting, they are not the hard evidence necessary to survive strict scrutiny. Moreover, these theories are of questionable validity and represent only one of many points of view on the role and effect of money in ballot measure election campaigns.

a. The State Court Opinion Conflicts with All Relevant Precedent.

The conclusion of the state court that large contributions to a ballot measure campaign threaten and potentially pervert or corrupt the electoral process is in conflict with virtually every other appellate court opinion to address this and closely related issues. In speculating that large contributions have such *potential*, the majority below failed to reconcile *Bellotti* and other cases which have rejected the notion that the prevention of perversion or corruption is a compelling interest in ballot measure campaigns.

Bellotti which invalidated a Massachusetts law prohibiting corporate contributions and expenditures in ballot measure campaigns concluded that there is no risk of corruption in such campaigns. *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 789-90. As previously indicated, appellees cannot rely on *Buckley* which based its holding on the undue influence that large contributions appear to have on candidates and officeholders.

The holding of the majority below is also inconsistent with decisions of the Second, Fifth and Ninth Circuits and courts of other states. In *Schwartz* v. *Romnes*, 495 F.2d 844, the Court of Appeals for the Second Circuit rejected the assertion that prevention of corruption or perversion is a compelling governmental interest in a ballot measure election.

> Corporate funds paid to a candidate or political party have the potential of creating debts that must be paid in the form of special interest legislation or administrative action. In contrast, when the issue is one to be resolved by the public electorate monies paid by a corporation for public expression of its views create no debt or obligation on the part of the voters to favor the corporate contributor's special interest. Although large private companies have undoubtedly been tempted to "buy" the election of political candidates in the expectation of receiving favors if their candidates should be elected, *it is difficult to see how such motivation would play any substantial role in an attempt to influence votes for or against a referendum. The public remains completely free to reject the views of the corporate contributor, just as it did in the present case, without fear or retribution or non-support by the corporate contributor.*

Id. at 851 (emphasis added).

The *Schwartz* court also dismissed the appearance-of-corruption argument with respect to ballot measure contributions:

> Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions to a public referendum. The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights.

Id. at 852-53.

The Ninth Circuit applied similar reasoning in striking down a Montana statute that prohibited corporate contributions in support of or in opposition to ballot measures:

> The state interest in preventing corruption of officials, which provided the basis for the Supreme Court's finding in *Buckley* that restrictions could permissibly be placed on contributions, is not at issue here. *When corporations seek to influence the electorate and not an individual candidate*

> *or party, no such state interest exists because corporate activities cannot create political debts of the kind contemplated in Buckley. . . .*
>
> *That a corporation's involvement may influence the vote provides no adequate reason to suppress corporate speech.*

C & C Plywood Corp. v. *Hanson,* 583 F.2d at 425 (citation omitted, emphasis added).

The three justices of the California Court of Appeal below unanimously shared the view of the Second and Ninth Circuits.

> [D]efendants insist that section 602 of the Berkeley Election Reform Act of 1974 is justified by Berkeley's interest in obviating the "*mere appearances* of political corruption. . . ." This contention is patently unfounded. Such an interest, within the context of participation by issue-oriented committees in the electoral process, cannot be accepted as legitimate, nor is it cognizable as "compelling."

Citizens Against Rent Control v. *City of Berkeley,* 99 Cal.App.3d at 742, 160 Cal.Rptr. at 452 (original emphasis); J.S. App. at A-38-39.

> We conclude that defendants can advance no interest sufficient to justify section 602's restrictions on protected First Amendment liberties. Quite the contrary, their case demonstrates compelling reasons why this type of expression should not be limited.

Id. at 745, 160 Cal.Rptr. at 453; J.S. App. at A-43.

In an advisory opinion in response to certified questions from the state legislature, the Michigan Supreme Court expressed its view that prohibitions on corporate expenditures or contributions with respect to ballot measures were unconstitutional.

> We believe a significant distinction exists between corporation contributions or expenditures made for the purpose of influencing the nomination or election of a candidate and, on the other hand, corporate contributions

> or expenditures made for the purpose of expressing a position or opinion concerning a public issue which may include the qualification, passage or defeat of a ballot question. . . .
>
> Contributions or expenditures by corporations to communicate their positions or opinions concerning ballot questions serve to enlighten the public and encourage an informed decision-making process. Such contributions or expenditures create no danger of incurring obligations from an elected official to a major contributor. The right of the public to be informed is a paramount consideration in seeking to preserve the free exchange of ideas in the market place.
>
> A ballot question may affect the assets, the conduct, or, indeed, the very existence of a corporation. Especially in such cases, the corporation is deserving of a public forum to express its position or opinion, much the same as the public has a right to hear those same matters.

Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465, 242 N.W.2d 3, 14-15 (1976) (footnotes omitted). *See also Frias* v. *Board Trustees of Ector County*, 584 S.W.2d 944 (Tex. Civ. App. 1979).

Just four weeks prior to the filing of the decision below, the Court of Appeals for the Fifth Circuit held that there is no threat of corruption or perversion which could be abated by limits on contributions to ballot measure campaigns. *Let's Help Florida* v. *McCrary*, 621 F.2d 195, invalidated a Florida law that limited contributions to statewide and county ballot measure campaign committees to $3,000 and $1,000, respectively. The Fifth Circuit unanimously rejected the governmental interest in preventing corruption or perversion as being compelling in a ballot measure campaign.

> When people elect a candidate, they choose someone to whom they can delegate their political decisionmaking. The people's need to prevent large contributors from improperly influencing this representative decisionmaker is critical. In contrast, when people vote on a referendum proposal, they directly decide the pertinent political issue for themselves. Large contributions for publicity by one

> group or another do not influence the political decision-makers—in this case, the voters themselves—except in a manner protected by the first amendment. . . . With regard to referendum elections, appellants cannot justify the statutory restrictions upon political contributions as a means for preventing corruption.

Let's Help Florida v. *McCrary*, 621 F.2d at 199-200; J.S. App. at A-96-98. Although its decision directly conflicted with *Let's Help Florida*, the majority below inexplicably failed even to mention the case (the dissent did take note of it, *Citizens Against Rent Control* v. *City of Berkeley*, 27 Cal. 3d at 836-37, 614 P.2d at 752-53, 167 Cal.Rptr. at 94-95 (Richardson, J. dissenting); J.S. App. at A-25-26).

Berkeley's unsubstantiated assertion that contribution limits are necessary to prevent dominant voices from unduly influencing public opinion is also inconsistent with *Miami Herald Publishing Co., Division of Knight Newspapers, Inc.* v. *Tornillo*, 418 U.S. 241 (1974), which rejected similar contentions when it considered the validity of legislation compelling newspapers to allow candidates to reply to editorials. Florida asserted that the press had "become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events," that economic factors had "made entry into the marketplace of ideas served by the print media almost impossible" to less affluent competing points of view, that "[t]he result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion" and that the public had "lost any ability to respond or contribute in a meaningful way to the debate on issues." *Id.* at 249-51. These arguments, analogous to Berkeley's, were rejected in *Miami Herald Publishing*. "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." *Id.* at 256. As Justice White said in his concurring opinion:

> Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain

> intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.
>
> . . .
>
> Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed. . . .

Id. at 259-60 (White, J. concurring) (footnotes omitted).

Much like Florida in *Miami Herald Publishing*, Berkeley seeks to promote an electorate unencumbered by the thoughts of dominant voices. But unlike Florida's right-of-reply statute, the Berkeley contribution limit does not even have the virtue of directly promoting this goal. Section 602's effect is to reduce political debate to a low common denominator, which is inimical to the first amendment's purpose of securing the widest possible dissemination of ideas.

The state court also hypothesized that the alleged dominant influence of large amounts of money causes "voters [to] lose confidence in our governmental system if they come to believe that only the power of money makes a difference." 27 Cal.3d at 827-28, 614 P.2d at 747, 167 Cal.Rptr. at 89; J.S. App. at A-11. Similarly, in *Bellotti*, Massachusetts asserted as compelling "the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government." *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 787. Rejecting this argument, this Court stated:

> Appellee advances a number of arguments in support of his view that these interests are endangered by corporate participation in discussion of a referendum issue. They hinge upon the assumption that such participation would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the

> people in the democratic process and the integrity of government. According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government. Cf. *Wood* v. *Georgia*, 370 U.S. 375, 388 (1962).
>
> Nor are appellee's arguments inherently persuasive or supported by the precedents of this Court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections, ... simply is not present in a popular vote on a public issue.

Id. at 789-90 (citations and footnote omitted).

Perhaps the most eloquent answer to the argument that undue influence over the voters justifies limits on free and full political communication was written by Justice Rutledge in a concurring opinion in *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106 (1948):

> For "undue influence" in this connection may represent no more than convincing weight or argument fully presented, which is the very thing the Amendment and the electoral process it protects were intended to bring out. And one may question how far legislators may go in accurately assessing undue or disproportionate weight as distinguished from making substantially accurate findings and conclusions concerning corruption.

Id. at 144-45 (Rutledge, J., concurring).

In essence the theme underlying the state court's factually unsubstantiated argument concerning loss of confidence is

again, that government may restrict political debate so that certain interests do not dominate or unduly influence public opinion. This Court and others have expressly rejected the contention that the ability of persons to influence the outcome of elections through political communication and advocacy corrupts or perverts the electoral system.

b. Contributions Do Not Corrupt or Pervert Ballot Measure Campaigns.

Sound reasoning as well as common knowledge support the numerous appellate court decisions which reject the theory that political communication corrupts or perverts the electoral process. Moreover, the state court's unequivocal conclusion that campaign contributions diminish voters' confidence in government by fostering the belief that only money determines the outcome of issue elections, is a disputed and unsubstantiated theory insufficient to justify curtailment of first amendment freedoms.

Political science studies and articles on ballot measure election results reach conflicting conclusions about the significance and impact of money and reveal almost as many opinions as there are authors. Yet on one point almost all authors agree: the spending of money is *but one* of many factors that influence the way a citizen votes. Other important voter influences are endorsements by public figures, organizations, newspapers, and radio and television stations, the length and complexity of the issue, the timing of candidate elections, and the voter's personal ideology, party affiliation and cultural and socio-economic background.[18] Indeed, all the data below on the effects of

[18] *See, e.g.*, E. Lee, *California*, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 101-20 (D. Butler & A. Ranney eds. 1978) (hereinafter Lee, *California*); H. Hamilton, *Direct Legislation: Some Implications of Open Housing Referenda*, 64 AM. POL. SCI. REV. 124, 127-29, 132-36 (March 1970) (hereinafter Hamilton, *Direct Legislation*); J. GREGG, NEWSPAPER ENDORSEMENTS AND LOCAL ELECTIONS IN CALIFORNIA 27 (1966); T. Henderson and W. Rosenbaum, *Prospects for Consolidating Local Government: The Role of Elites in Electoral Outcomes*, 17 AM. J. POL. SCI. 695 (1973); N. Brestoff, *The California Initiative Process: A Suggestion for Reform*, 48 SO. CAL. L. REV. 922, 934-42 (1975); D. Magleby, Direct Legislation: Voting on Ballot Propositions in the United States 18-20, 248-81, 300-31, 344-50 (1980) (unpublished dissertation available at Alderman Library, U. of Va.) (hereinafter Magleby, Direct Legislation).

money in ballot measure campaigns was offered by appellants and showed that with respect to 28 controversial California state ballot measures between 1954 and 1974, the side that spent the most money won only 50% of the time. Jt. App. at 15-17.

The theory that large contributions cause or have caused voter apathy and diminish faith in the initiative process is also without the benefit of evidence.[19] A brief history of rent control elections in Berkeley is to the contrary. In 1972, Berkeley voters adopted the City's first rent control law, Berkeley City Charter, art. XVII (Stats. 1972 (Reg. Sess.) res. ch. 96, p. 3372) and amendments to article V. Shortly after that law was declared unconstitutional in *Birkenfeld* v. *City of Berkeley*, 17 Cal.3d 129, 550 P.2d 1001, 130 Cal.Rptr. 465 (1976), proponents of rent control put Measure B on the April 19, 1977 ballot (proposed amendment to Berkeley City Charter, arts. V and XVII), the campaign giving rise to this lawsuit. When Measure B was defeated, the proponents again qualified a rent control initiative for the November 7, 1978 ballot, Measure I, the Renter Property Tax Relief Ordinance of 1978 (expired Dec. 30, 1979), which the Berkeley voters passed into law. On June 3, 1980, the Berkeley voters adopted a stronger rent control law, Measure D, the Rent Stabilization and Eviction for Good Cause Ordinance. There were no contribution limits in effect during any of these four election campaigns. Despite this fact, rent control measures were placed on the municipal ballot four times in a period of eight years and were adopted into law by the voters three out of four times. Thus, it can hardly be said that Berkeley voters were apathetic, unduly influenced or dominated by special interests opposed to rent control or that they had lost confidence in the integrity of the initiative process as a result of large contributions.

[19] The state court articulated no basis for its assertion that voter apathy was increasing in ballot measure elections; indeed studies show that voter interest in and use of ballot measures has increased significantly in recent years. *See* note 20, *infra*.

The questionable theories of several commentators constituted the sole basis for the state court's willingness to permit Berkeley to curtail appellants' rights of political communication and association. Had the court below looked at those states and local jurisdictions where direct legislation is permitted or contemplated, it would have found conclusions and opinions strikingly different from those of the commentators who have predestined the demise of popular democracy through direct legislation. The frequency of use, the unpredictability of outcome and the increasing public interest in the ballot measure process give substantial credence to the conclusion that direct legislation is alive and well in America and enjoying great voter confidence.[20]

Perhaps the vitality of the direct legislative process is partly due to existing legislation that has been enacted to protect electoral integrity and to instill voter confidence by means that do not restrict the flow of communication and debate. For example, California and Berkeley laws require periodic, timely and local public disclosure of contributions to and expenditures by ballot measure campaign committees prior to an election. CAL. GOV'T CODE §§ 84200 and 84211 (Deering). Such information is readily available to the public, CAL. GOV'T CODE § 81008 (Deering), and is regularly reported in newspapers and other media. Campaign committee disclosure reports required by section 412(g) of the Ordinance must contain the identity, address, occupation and employer of all contributors of $50 or more and section 112 further requires that the City publish this information in local newspapers twice before each election.

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[20] *See* Ranney, *The United States of America*, *supra* note 17, at 69-73; Lee, *California*, *supra* note 18, at 90-91; [Jan. 12, 1981] 2 THE INITIATIVE NEWS REPORT, No. 1 (INITIATIVE NEWS SERVICE) 4-8; NEW YORK SENATE RESEARCH SERVICE TASK FORCE ON CRITICAL PROBLEMS, THE POPULAR INTEREST VERSUS THE PUBLIC INTEREST . . . A REPORT ON THE POPULAR INITIATIVE 10-14, 31 (1979); *see generally* Magleby, Direct Legislation, *supra* note 18, at 62, 110-13, 358-64, 405-06. "Since the inception of direct legislation in 1989 there have been over 17,000 statewide propositions. . . ." *Id.* at 110. *See also* Hamilton, *Direct Legislation*, *supra* note 18, at 125. There is no accurate account of the number of issues on local ballots but academic experts estimate that there may be 10,000 to 15,000 annually. Ranney, *The United States of America*, *supra* note 17, at 73.

There are numerous other ways that government can protect the electoral process without limiting political debate. California Elections Code section 29795 imposes a fiduciary duty on persons who form ballot measure committees by requiring them to act as trustees of all contributions and to use such funds only for expenditures directly related to that ballot measure. Also, the Federal Communications Commission's Fairness Doctrine requires all radio and television stations to provide coverage of ballot measure campaigns in a fair manner and to provide free time to advocates of one position if necessary to restore fair coverage if it is unbalanced due to advertising purchased by the opposition. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); 48 F.C.C.2d 1, FAIRNESS REP. (1974). Contrary to the implication of the majority below, that the purchase of ballot measure elections is equivalent to the purchase of a candidate for public office, California Elections Code section 29622 prohibits the use of campaign funds to purchase votes in ballot measure elections.

The state court apparently was concerned that special interest groups allegedly threaten ballot measure campaigns and it implied that their participation in campaigns indicates a malignancy in the democratic process. Yet, the suggestion that advocacy by special interest groups is inconsistent with our democratic process ignores the foundation and operation of our democracy. It is persons grouped together to promote or oppose ballot measures or other issues of public importance who are in fact the special interests seen by the majority below to be a harmful influence. By promoting political debate and communication, such groups actually advance the proper functioning of government.[21]

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[21] *See* V. O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS 130 (5th ed. 1967): "The view that pressure groups are pathological growths in the body politic is likewise more picturesque than accurate. A safer assumption is that groups developed to fill gaps in the political system." Note, *Corporate Contributions to Ballot Measure Campaigns*, 6 U. MICH. J.L. REF. 781, 786 (1973): "A pattern of association for political purposes pervades American politics. Theorists may point to individual participation in politics as a basic element of a pluralistic democratic society, but individual values are successfully achieved in politics by group action. In initiative campaigns especially, interest group involvement is important to the proper functioning of the political process. . . . Interest groups inform the electorate of how the enforcement of particular measures would affect them, allowing voters to balance competing claims."

c. There Is No Imminent Threat to the Integrity of the Initiative or Electoral Process.

Section 602 was improperly sustained solely upon the thesis that large contributions to a ballot measure campaign may *potentially* pervert or corrupt the electoral process at some undefined future date. However, assuming that contribution limits did serve a compelling governmental interest, that interest must be *imminently threatened* in order for the strict scrutiny requirements to be satisfied. *First National Bank of Boston* v. *Belloti*, 435 U.S. at 789.

Appellees offered no evidence and the majority below did not conclude that large contributions pose an imminent threat to the electoral process. The state court thus departed from the requirement that the government demonstrate the existence of an imminently threatened and compelling interest.

d. There Is No Nexus Between Section 602's Restriction of Political Communication and Any Legitimate Governmental Interest.

There is no nexus or direct relationship between restrictions on the quantity of political debate and potential perversion of the democratic processes, and the court below failed to articulate one. Limits on contributions to ballot measure campaigns only serve randomly, if at all, the interest of preservation of the integrity of the electoral process.

The theme underlying the state court's opinion is that large contributions result in one-sided campaigns virtually assuring the success of wealthy advocates, silencing the voices of others, and causing voter apathy. Yet the exercise of first amendment rights could in no way corrupt or appear to corrupt the electoral process, but could serve only to increase political communication and debate regarding the ballot measure. The voters remain free to evaluate and then either accept or reject the political arguments. The state court in actuality was concerned that appellants' speech would persuade the voters and affect the outcome of ballot measure elections, rather than corrupt or pervert the initiative process. "But the fact that advocacy may persuade the electorate is hardly reason to suppress it." *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 790.

Even assuming that the spending of large sums of money for political communication creates an apathetic electorate, contribution limits do not rectify that problem. Persons or entities who desire to spend large amounts of money in support of or in opposition to a ballot measure are at liberty to do so as long as they do it independently of others because expenditure limits are unconstitutional whether they relate to ballot measure or candidate elections. *Buckley* v. *Valeo*, 424 U.S. at 51; *Citizens for Jobs and Energy* v. *FPPC*, 16 C[illegible]d 671, 675, 547 P.2d 1386, 1388, 129 Cal.Rptr. 106, 108 (1976); *see Pacific Gas and Electric Co.* v. *City of Berkeley*, 60 Cal.App.3d 123, 131 Cal.Rptr. 350 (1976). Thus the operative effect of the contribution limit when combined with the right to make unlimited independent expenditures, is not to limit money spent for political communication but rather to force persons who desire to spend any sums in excess of $250 to act independently of each other. If voter confidence in the electoral process is diminished by large sums of money being spent for political communication, the state court failed to articulate how large contributions are more harmful than large expenditures in the context of a ballot measure campaign.[22]

By concluding that less political communication enhances voter interest and confidence in government, the state court embraced an unsubstantiated thesis of debatable validity. Section 602's actual effect is to reduce the vitality and quantity of political debate and is contrary to the first amendment's purpose of securing the widest possible dissemination of ideas

[22] The state court did not address this issue but purported to yield such a "value judgment" to legislative determination. J.S. App. at A-16. The court's position, however, ignores previous decisions that have not left that determination to the legislature. Buckley v. Valeo, 424 U.S. 1 (1976); Citizens for Jobs and Energy v. FPPC, 16 Cal. 3d 671, 547 P.2d 1386, 129 Cal.Rptr. 106 (1976); Pacific Gas & Electric Co. v. City of Berkeley, 60 Cal.App.3d 123, 131 Cal.Rptr. 350 (1976). On the basis of these precedents, the City of Berkeley acknowledged that the expenditure limits contained in sections 513-14 of the Ordinance, J.S. App. at A-78, were unconstitutional and unenforceable, J.S. App. at A-53.

in order to promote an alert and informed citizenry. As a consequence, section 602 is more likely to discourage voter participation and interest than to enhance it.

Section 602 accomplishes nothing other than to restrict political advocacy. The purpose of contribution limits in candidate campaigns is to prevent the candidate from receiving, and the donor from giving, so much money as to corrupt or appear to corrupt a future holder of public office. It is the "tainted" money which is the source of evil, not the speech which is made possible thereby. In contrast to candidate contribution limits, the purpose of ballot measure contribution limits is to attempt to equalize the effectiveness of political communications by restricting public debate regarding issues submitted directly to the voters. The former is an attempt to protect the voters from corruption of their elected officials, while the latter is an attempt to curtail speech designed to inform the voters. Put another way, candidate contribution limits seek to limit undue influence which might prevent the voters' wishes from in fact being carried out by their elected representatives, while ballot measure contribution limits attempt to restrain effective speech and advocacy which might inform and thereby influence the voters.

By sanctioning a limit on the amount of political debate, the state court essentially held that the citizenry was incapable of listening to and evaluating the merits and demerits of ballot measure issues. Besides betraying a basic mistrust of the intelligence of the electorate, the state court allows Berkeley to assume a guardianship of the public mind, restricting the quantity, flow and effectiveness of political communication so as allegedly to prevent the City's electorate from being confused and misled. This paternalistic attitude assumes that restricting public debate is permissible in order to help the citizenry make wise decisions. The fallacy of this reasoning was well stated by the Court of Appeal below:

> One of the principal reasons for making a contribution is to persuade. It is true that many people fear that unlimited expenditures by large corporations or by wealthy individuals will not add to the electorate's edification, but

> will instead inundate the electorate with material which is slanted and misleading. We believe that to accept this premise is to slander the intelligence of the voters. Assuming that the sources of contributions are disclosed, as is required under the Berkeley legislation, a contribution limitation evidences a fundamental distrust of the voters' ability to recognize campaigning by special interest advocates within the context of an issue-oriented election. Such a paternalistic attitude is repugnant to the First Amendment: "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced, . . . it is a danger contemplated by the Framers of the First Amendment." (*First National Bank of Boston* v. *Bellotti, supra*, 435 U.S. 765, 791-792.)

Citizens Against Rent Control v. *City of Berkeley*, 99 Cal.App.3d at 746, 160 Cal.Rptr. at 454; J.S. App. at A-44-45.

There is no nexus between section 602 and any legitimate, let alone compelling, governmental interest. Limits on contributions to ballot measure campaigns serve only to restrict political communication in an attempt to equalize the voices of all sides of the issue. This is simply not sufficient to uphold section 602.

e. The Decision Below Dangerously Implicates Other Exercises of First Amendment Rights.

In accepting the superficially attractive argument that large contributions for political communication are bad, the state court decision may affect related first amendment liberties. While ballot measure campaigns allow the public to decide directly certain issues of public importance, other issues are decided indirectly by the citizenry.

In the past twenty years there have been many controversial and fundamental social and political issues decided in large part after the expenditure of millions of dollars by one side or the other for the purpose of influencing public opinion. Large scale advertising, direct mail and organizational campaigns have been conducted by proponents or opponents of issues such as civil rights, women's rights, the war in Vietnam, the right to bear firearms, and the "right to life." In many of the national, state and local publicity campaigns involving these and other vital issues, one side or special interest group has heavily outspent its opposition to influence public opinion and, indirectly, governmental action. The rationale by which the court below upheld restrictions on public debate over a ballot measure could be extended to permit limits on political communication and association concerning non-ballot measure issues. This simply shows one of the potential dangers created by the unorthodox decision under appeal which sanctions direct restriction of political communication.

CONCLUSION

The drafters of the Berkeley Ordinance ignored fundamental precepts of our political and governmental system. They apparently assumed that monetary contributions to enhance public debate can be evil, and failed to acknowledge that political communication is protected by our Constitution. As a consequence, section 602 limits the ability of citizens to pool their resources to campaign effectively in a ballot measure election and infringes on the fundamental first amendment rights of speech and association, as well as the right of citizens to receive all information available on issues of public importance.

Appellees failed to demonstrate the existence of a compelling governmental interest to justify section 602; nor is such a demonstration possible in the context of a ballot measure campaign. As acknowledged in the reasoning and opinions of this Court and those of the Second, Fifth and Ninth Circuits, there is no imminently threatened governmental interest that is or could be served by limits on contributions to ballot measure campaigns. Hence there is no justification for section 602.

The decision of the state court is grounded in a misapprehension of the proper role of government as a would-be protector of the public from what are perceived to be dominant influences cloaked in the veil of monetary wealth. Such governmental paternalism, benevolent and well-intentioned as it may be, must not be allowed to intrude upon the vital, free marketplace of ideas crucial to the democratic election process. The voting public should and must be allowed to form its own conclusions based upon all available information.

It is respectfully submitted that the decision of the California Supreme Court be reversed and section 602 be declared unconstitutional.

Respectfully submitted,

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